A **DEVELOPMENT & COMMERCIAL BANK BHD & ORS**

v.

LOKE THEEN FATT

B HIGH COURT SABAH & SARAWAK, KOTA KINABALU
DAVID WONG DAK WAH J
[BANKRUPTCY NO: 455-1992-I]
23 OCTOBER 2009

C ***BANKRUPTCY:*** *Discharge - Discharge of bankrupt - Whether discharge proper as bankrupt paid only 2% of outstanding debt - Whether bankrupt committed an offence under Bankruptcy Act 1967 and discharge could not be allowed under s. 33(4) of same - Whether report by Director General of Insolvency flawed - Bankruptcy Act 1967, s. 33 - Bankruptcy Rules*
D *1969, r. 194*

Pursuant to an application made under s. 33 of the Bankruptcy Act 1967 ('the Act') and r. 194 of the Bankruptcy Rules 1967, the Deputy Registrar ('DR') discharged the respondent as a bankrupt subject to a consent judgment entered against the respondent for the
E balance of the respondent's debt as at the date of the discharge. The appellants appealed claiming, amongst others, that the respondent had paid only 2% of the outstanding debt; that he committed an offence by not filing his statement of account within the statutory 14-day period and by reason thereof the discharge
F could not be granted unless 50% dividends of the debt had been paid as required under s. 33(4) of the Act; and that the report by the Director General of Insolvency ('DGI') was flawed.

Held (dismissing the appeal with costs):

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(1) Based on the principle of law established in the Singapore case of *Re Siah Ooi Choe; ex p Hong Kong Shanghai Banking Corporation*, there was no merit in the appellants' contention that the discharge should not be allowed as the respondent paid
H only 2% of the outstanding debt. (paras 3 & 4)

(2) The word "committed" in s. 33(4) of the Act meant that the bankrupt must have been charged in court by the DGI for that offence. Since the respondent had not been cited for contempt
I of court by the DGI, the respondent had not committed any offence under the Act as specified under s. 33(4) of the Act. It

followed that the application for the respondent's discharge must be dealt with pursuant to s. 33(3) of the Act. Section 33(3) provided the court some guidelines as to how to exercise its discretion on whether or not to grant an order for discharge. Those guidelines required the court to look into the totality of the evidence or circumstance of the bankrupt and then ask itself the question whether it was fair or just to grant a discharge. The starting point must be the DGI's report which in law must be taken as *prima facie* evidence of the respondent's conduct but it could be challenged by the creditors (*Re Lau Kah Lay & Anor; ex p Cold Storage (M) Bhd*; refd). (paras 5 & 6)

(3) The DGI prepared two reports for the court which were comprehensive. When the DGI raised no objection to the application for discharge by the respondent, the court should grant the discharge unless the opposing creditor could show cogent reasons why the DGI's report should not be accepted. The role of the DGI was statutorily prescribed and it involved administrating the estate of the bankrupt including a thorough investigation of the debtor's affairs for the purpose of making a report for the court and to find out if there was any evidence of any offence under the Penal Code and the Bankruptcy Act. (para 7)

(4) The DGI in the instant case had performed his statutory duties as required by law. He had in his supplementary report made quite a detailed write up on the activities of the respondent and his wife in relation to the companies related to the respondent. He also found no impropriety in their conducts and there was no evidence by the opposing creditors to say that his findings were flawed. In fact, his specific finding was that there was no proof that the respondent was guilty of any fraud or breach of trust. The appellants did not provide any information or evidence to the DGI to further investigate what they were alleging. The DGI performed his statutory duty and if the appellants were not satisfied with it, they had a duty to challenge his report with evidence. However, there was no such evidence herein. (para 7)

(5) The respondent was 50 years old and was made a bankrupt at the age of 34. During the period of bankruptcy, he conducted himself in a manner which in the opinion of the DGI was

"good and satisfactory". The respondent might have breached some provisions of the Act but it was not serious enough for the DGI to cite him for contempt of court. Neither did the appellants take any action for those omissions. The DGI also found out that the bankruptcy was not brought about by the respondent's extravagant living but due to bad economic times. Further, he was the guarantor of a loan. Those considerations taken as a whole justified the grant of the conditional discharge by the DR. (para 8)

(6) Creditors do not have a substantive right to keep a person bankrupt for life (See Hamid Sultan JC (as he then was) in *Re Siow Ah Moi; ex p United Orient Leasing Co Bhd*). The intention of Parliament in passing the Act was clear. Bankrupts as of right could apply for a discharge and if the circumstances permit, the court should grant the application. (para 8)

(7) The discharge given by the DR was conditional to a consent judgment for the outstanding balance. The execution could not be issued on the consent judgment without leave of the court and leave would only be granted if after the discharge the respondent had acquired property or income available for payments of his debts. With the conditional discharge, the appellants were not prejudiced. In fact it was to their benefit that the respondent would be able to venture into business and hopefully earn income to repay his debts which he could not do so as a bankrupt. (para 8)

Case(s) referred to:

Re Joshua Tan Pin Pin, ex p William Jacks & Co (M) Sdn Bhd [2007] 3 CLJ 153 HC ***(refd)***

Re Lau Kah Lay & Tang Kuong Tiew; ex p Cold Storage (Malaysia) Bhd [2001] 3 CLJ 960 HC ***(refd)***

Re Siah Ooi Choe; ex p Hong Kong Shanghai Banking Corporation [1988] SLR 903 ***(refd)***

Re Siow Ah Moi; ex p United Orient Leasing Co Bhd [2007] 8 CLJ 104 HC ***(refd)***

Legislation referred to:

Bankruptcy Act 1967, s. 33(3), (4)
Bankruptcy Rules 1969, r. 194

For the appellants - Alvin Leong; M/s Shelley Yap
Phyllis Lo; M/s Cheu Adnan & Razi
Kelly Kong; M/s Lind Willie Wong & Chin
For the respondent - Chong Ket Vui; M/s Chong Ket Vui & Co

Reported by Usha Thiagarajah

JUDGMENT

David Wong Dak Wah J:

Proceeding

[1] This is an appeal against the decision of the deputy registrar on 17 March 2006 which allowed the application of the respondent for a discharge as a bankrupt subject to a consent judgment entered against the respondent for the balance of the respondent's debt as at the date of discharge. The application was made pursuant to s. 33 of the Bankruptcy Act 1967 and r. 194 of the Bankruptcy Rules 1969. The respondent was adjudicated a bankrupt on 1 October 1993.

Contentions Of The Appellants

[2] The grounds relied on by appellants are these:

i. The respondent had only paid a sum of RM202,442.27 which is merely 2% of the outstanding debt which is around RM16,337,788.33.

ii. The respondent had failed to file his statement of account within the statutory period of 14 days.

iii. The respondent had failed to submit book of account detailing his finances and expenditures over a period of three years.

iv. The respondent had continued to trade despite being bankrupt.

v. The DGI report is flawed.

Ground 1

[3] The answer to this contention can be found in the case of *Re Siah Ooi Choe; ex p Hong Kong Shanghai Banking Corporation* [1988] SLR 903, where the court held on this point, *inter alia*, as follows:

> ... with reference to the size of the debt, the Court agreed that it was a very big one, but there was no upper limit set out by the Act beyond which discharge was barred. The huge amount of debt here merely reflected that fact that a big business when it failed, tended to fail in a big way and it was in recognition of this fact that no maximum amount was stipulated in the Act ...

[4] This principle of law has been adopted in this country; hence I find that this contention is without merit.

Ground 2

[5] The contention here is that since the bankrupt had committed an offence in failing to file his statement of affairs within the statutory period, the deputy registrar under s. 33(4) of the Act can only grant a discharge only if 50% dividends of the debt had been paid. In the case of *Re Joshua Tan Pin Pin, ex p William Jacks & Co (M) Sdn Bhd* [2007] 3 CLJ 153, the court held that the word 'committed' in s. 33(4) of the Act means that the bankrupt must have been charged in court by the Director General of Insolvency (DGI) for that offence. I see no reason to differ from that view and since the respondent had not been cited for contempt of court by the DGI, I find that the respondent had not committed any offence of the Act as specified in s. 33(4) of the Act. It follows then the application for the respondent's discharge must be dealt with pursuant s. 33(3) of the Act which states as follows:

> (3) On the hearing of the application the court shall take into consideration a report of the Director General of Insolvency as to the bankrupt's conduct and affairs, including a report as to the bankrupt's conduct during the proceedings under his bankruptcy, and may either grant or refuse an absolute order of discharge, or suspend the operation of the order for a specified time, or grant an order of discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the bankrupt, or with respect to his after-acquired property.

[6] This section provides the court some guidelines as to how to exercise its discretion whether or not to grant an order of discharge. These guidelines require the court to look at the totality of the evidence or circumstance of the bankrupt and then ask itself the question whether it is fair or just to grant a discharge. The starting point must be the DGI's report which in law must be taken as *prima facie* evidence of the respondent's conduct but it can be challenged by the creditors as stated by Ian Chin J in *Re Lau Kah Lay & Tang Kuong Tiew; ex p Cold Storage (Malaysia) Bhd* [2001] 3 CLJ 960:

> The OA carries the onerous task of ensuring that a bankrupt has no hidden assets stashed away whether in his name or in the name of his wife or children as otherwise people will be imbued with the message that money borrowed can be stashed away and need not be repaid and such horde can be enjoyed even when one is bankrupt. If the office of the OA does not show itself equal to the task of preventing such rip-off the creditor, then cases of borrowers not repaying and not minding to be made bankrupt will be the rule rather than the exception. Then the business morality will decline.

[7] The DGI had prepared two reports for the court and on the face of it they are comprehensive. It is my view that when the DGI in his report raises no objection to the application for discharge by the respondent the court should grant the discharge unless the opposing creditor can show cogent reasons why the DGI's report should not be accepted. The role of the DGI is statutorily prescribed and it involves administrating the estate of the bankrupt including a thorough investigation of the debtor's affairs for the purpose of making a report for the court and to find out whether if there is any evidence of any offence under the Penal Code and the Bankruptcy Act. From the reports submitted in this case one can see that the DGI had performed his statutory duties as required by law. He had in his supplementary report made a quite a detailed write up on the activities of the respondent and his wife in relation to the companies related to the respondent. He had also found no impropriety in their conducts and there is no evidence by the opposing creditors to say that the DGI's findings are flawed. In fact his specific finding is that there is no proof that the respondent 'had been guilty of any fraud or breach of trust'. It is not insignificant that the appellants had not provided any information or evidence to the DGI to further investigate what they are alleging. The DGI had performed his statutory duty and if the appellants are not satisfied with it they have a duty to challenge his report with evidence. In the present case there was no such evidence.

[8] Reverting to the question at hand and that is whether in the circumstances it is fair to grant the discharge. Presently the respondent is now 50 and was made a bankrupt at the young age of 34. During the period of bankruptcy he had conducted himself in a manner which in the opinion of the DGI was 'good and satisfactory'. Admittedly the respondent may have breached some provisions of the Act but the reality is that it was not serious enough for the DGI to cite him for contempt of court. Neither the

A appellants had taken any action for those omissions. The DGI has also found that this bankruptcy was brought about not by the respondent's extravagant living but being caught up during bad economic times. Further he was a guarantor to a loan. These considerations taken as a whole in my view justified the deputy
B registrar in granting a conditional discharge. As stated by Hamid Sultan JC (as he then was) in *Re Siow Ah Moi; ex p United Orient Leasing Co Bhd* [2007] 8 CLJ 104 creditors do not have a substantive right to keep a person bankrupt for life. The intention of Parliament in passing the Bankruptcy Act is clear and that is
C bankrupts as of right can apply for a discharge and if the circumstance permits the court shall grant the application. In any event the discharge given by the deputy registrar is conditional to a consent judgment for the balance outstanding. What that means is that execution cannot be issued on the consent judgment without
D leave of the court and leave will be granted only if after the discharge the respondent had acquired property or income available for payments of his debts. With this conditional discharge the appellants in my view had not been prejudiced in any way at all. In fact their benefit had been enhanced in that the respondent will be
E able to venture into business again and hopefully will be able earn income to repay his debts which he could not do so as a bankrupt.

[9] As for grounds 3 and 4, they have been dealt with adequately in the DGI reports, hence no necessity for me to discuss further.
F As for ground 5, it had been dealt with by me earlier on.

[10] For all the reasons stated above it is my view that the deputy registrar's decision is a fair and just one. Accordingly I dismiss this appeal with costs to the respondent.

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